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DISEMBODIED EVIDENCE: Understanding & Meeting Mental Defenses

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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MENTAL HEALTH ISSUES: THE ELEPHANT IN THE ROOM

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Arizona Prosecuting Attorneys' Advisory Council / August 3, 2012

Program Overview

- Part I: Mitigation Evidence & Case Law Overview
- Part II: Arizona v. Newell
- Part III: Working with Mental Health Experts
- Part IV: Questions & Answers

PART I: MITIGATION EVIDENCE AND CASE LAW OVERVIEW

A.R.S. 13-701(E) (Mitigating Factors)

- E. For the purpose of determining the sentence pursuant to subsection C of this section, the court shall consider the following mitigating circumstances:
 1. The age of the defendant.
 2. The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
 3. The defendant was under unusual or substantial duress, although not to a degree that would constitute a defense to prosecution.

A.R.S. 13-701(E) (Mitigating Factors)

- 4. The degree of the defendant's participation in the crime was minor, although not so minor as to constitute a defense to prosecution.
- 5. During or immediately following the commission of the offense, the defendant complied with all duties imposed under [A.R.S. 28-601](#), [28-602](#) and [28-603](#).
- 6. Any other factor that is relevant to the defendant's character or background or to the nature or circumstances of the crime and that the court finds to be **mitigating**.

Relevant Cases

- *State v. Fish*
• 2009 WL 1879479 (Ariz. App., Div. 1, June 30, 2009)
- *Clark v. Arizona*
• 548 U.S. 735 (2006)
- *Phillips v. Araneta*
• 93 P.3d 480 (Ariz. 2004)
- *State v. Johnson*
• 276 P.3d 544 (Ariz. App., 2012)

PART II:
THE STATE OF ARIZONA V.
STEVEN RAY NEWELL

Steven Ray Newell



Elizabeth Byrd

- 8 year-old, White female
- Disappeared on her way to school in South Phoenix
- Newell dated Elizabeth's older sister, Lori.



Timeline: AZ v. Newell

- February 2000
 - Newell uses ruse with female victim he met at neighbor's apartment
 - Held her at knifepoint
 - Newell pled guilty to attempted kidnapping
- December 2000
 - Newell released from County Jail

The Issue of 2000 Offense

- Newell met the victim at a neighbor's apartment
- He asked her for a ride
- Newell then pulled a knife and told the victim to drive
- Newell made sexual comments and told the victim he wanted her to drive to the desert
- The victim told Newell she had to use the restroom; she pulled into an AM/PM
- The victim told the store clerk she was being held at knifepoint

2000 Offense – Cont.

- Crime of Opportunity
- Sexual vs. Financial motive
- Incongruent Description of Events
 - Victim
 - Newell
- Goal-directed Behavior

Timeline: AZ v. Newell – Cont.

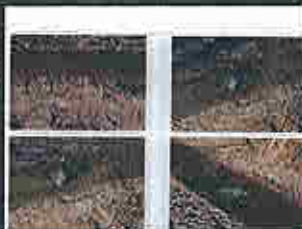
May 23, 2001

- 0745-0800 Hours – Elizabeth Byrd leaves for school
- 2358 Hours – Byrd's mother reported her missing to Phoenix PD
- SRP employee, Richard Verduzco observed Newell in an irrigation ditch with green indoor/outdoor carpet
- Upon seeing Verduzco, Newell jumped out of the canal and ran
- Newell assisted Byrds' family in the search for her

Timeline: AZ v. Newell – Cont.

May 24, 2001

- Elizabeth Byrd's body found in an irrigation ditch in Maricopa County
- 1300 Hours: MCSO takes over



Timeline: AZ v. Newell – Cont.

May 25, 2001

- Autopsy conducted by Marco Ross, M.D., Maricopa County Medical Examiner



Timeline: AZ v. Newell – Cont.

- May 26, 2001
 - Shoe Impressions collected are identified as Converse All Star 'Cynch' type shoes



Timeline: AZ v. Newell – Cont.

- May 27, 2001
 - First Law Enforcement interview of Newell
- May 31, 2001
 - DPS DNA technicians identify sperm cells on the inside of Byrd's underwear

Timeline: AZ v. Newell – Cont.

- June 2, 2001
 - Newell observed "acting strangely" at Byrd's funeral
 - Hugging and consoling victim's family members, looking around acting nervous
 - Noted to be wearing Converse All-Star Cynch shoes
 - Second MCSO interview this date – Newell voluntarily turned over his shoes

Timeline: AZ v. Newell – Cont.

■ June 4, 2001

- Newell's third interview with MCSO
- Initially denied any involvement in Byrd's death – changed his story later in the interview
- Newell admitted he convinced Byrd to go with him to the "pits" where he and Byrd stopped to read one of her school books
- Newell acknowledged guiding Byrd to sit between his legs and admitted to having an orgasm in his boxer shorts

Timeline: AZ v. Newell – Cont.

■ June 4, 2001- Cont.

- Newell denied that either he or Byrd removed any clothing
- Newell said Byrd did not call for help or "cry much" during the assault
- Admitted to placing Byrd's purse/backpack strap against her neck and demonstrated how he clenched his fist
- Acknowledged that he picked up Byrd's body and placed it in the canal

Timeline: AZ v. Newell – Cont.

■ June 4, 2001- Cont.

- Newell admitted he got into the canal with Byrd's body in order to manipulate it to avoid detection (including covering it with a section of green astro-turf lying nearby)
- Newell admitted he attempted to conceal a Converse shoe impression he left in the mud
- Rode his bicycle to a friends' house after the murder and talked for several hours
- Washed his shoes and clothes

Timeline: AZ v. Newell – Cont.

- June 5, 2001
 - Steven Ray Newell was arrested for the murder of Elizabeth Byrd
- August 27, 2001
 - Final Autopsy Report. Elizabeth Byrd died of asphyxia due to ligature strangulation
 - Blunt force injuries of vulva and vagina present
 - Manner of death = Homicide

Newell: Psych Reports

- Dr. Blue, Ph.D.
 - Report dated June 14, 2002
 - AXIS I – Attention Deficit/Hyperactivity Disorder; Polysubstance Dependence; Cognitive Disorder NOS with impairments in attention, memory, learning & executive function
 - AXIS II – “Not evaluated”
 - “...Use of stimulant is likely to have contributed to his difficulties with information processing and cognitive development.

Newell: Psych Reports – Cont.

- Forensic Psychologist
 - Report dated September 20, 2003
 - Newell “...experienced significant psychological disturbances...he perceived and related to Elizabeth as though she were Danielle (ex-girlfriend)...he simultaneously experienced feelings of attachment and dependency, fear of being abandoned, rage, and sexual feelings...”
 - Newell suffers severe methamphetamine abuse

Newell: Psych Reports – Cont.

- Forensic Psychiatrist, M.D.
 - Report dated November 16, 2003
 - Fetal exposure to substance(s) contributes to Newell's cognitive problems, including AD/HD
 - Suffered a series of "...very significant traumas including physical and sexual abuse as well as extreme neglect."
 - Newell's substance use history "...is extremely suggestive of self-medication of his pre-substance use mental conditions..."

Newell: Psych Reports – Cont.

- Forensic Psychiatrist, M.D. – Cont.
 - AXIS I – Posttraumatic Stress Disorder; Major Depressive Disorder; AD/HD; Cognitive Disorder NOS; Polysubstance Dependence in Institutional Remission
 - AXIS II – Deferred
 - AXIS III – No medical problems noted
 - AXIS IV – Absence of familial support; Serious legal problems
 - AXIS V – GAF=50

Timeline: AZ v. Newell – Cont.

- February 12, 2004
 - Steven Ray Newell was convicted of:
 - Count I – First Degree Murder
 - Count II – Sexual Conduct with a Minor under Fifteen
 - Count III – Kidnapping
- February 25, 2004
 - Sentenced to death



Newell: Psych Reports – Cont.

- Pharmacologist, Ph.D.
 - Report dated December 2, 2008
 - Newell's profile showed:
 - "...a severe psychiatric disturbance."
 - "...a long-standing history of drug and alcohol abuse, antisocial behavior, and an existing personality disorder."
 - "...it is not unreasonable to conclude that Mr. Newell's use of methamphetamine exacerbated this underlying psychiatric disorder and negatively affected his cognitive abilities thereby contributing to a diminished ability for Mr. Newell to exercise good judgment and control over his behavior."

Newell: Psych Reports – Cont.

- Dr. Red, Ph.D.
 - Report dated April 26, 2009
 - Neuropsychological data "...is unequivocally pointing toward both attentional and severe memory disorder."
 - "...Exaggeration of negative symptoms; psychopathological symptoms does not preclude the presence of neuropsychological deficit..."
 - "...Mr. Newell presents with the significant neuropsychological deficits he had in 2003..."

Newell's Version

- Video Excerpts – #1 and #3

"Pretty Amazing..."

- Video Excerpt - #2

Summing it up

- Video Excerpt - #13

A little "Concrete"

- Video Excerpt # 10

THE REPORT: PUTTING IT ALL TOGETHER

Opinion #1

Steven Ray Newell's conditions did **NOT** significantly impair his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law.

Basis for Pitt Opinion #1

- Steven Ray Newell:
 - Took Byrd to a secluded area
 - Used a ruse (taking her textbook) – presumably to get Byrd into his lap
 - Became sexually aroused and used the victim for sexual gratification
 - Fearful he would be caught, Newell strangled Byrd

Basis for Pitt Opinion #1- Cont.

- Steven Ray Newell:
 - Attempted to conceal Byrd's body in a canal after strangling her
 - Used near-by piece of astro-turf to cover Byrd in the canal
 - Made eye contact with a witness while disposing of Byrd's body

Basis for Pitt Opinion #1- Cont.

- Steven Ray Newell:
 - Fled the scene after making eye contact with the witness
 - Removed the clothes he was wearing and hid them in his car
 - Was aware that his sneakers left an impression at the scene
 - Washed and polished his shoes

Basis for Pitt Opinion #1- Cont.

- Steven Ray Newell:
 - Engaged in helping in the search for Elizabeth
 - Collected at least one newspaper article Re: the offense
 - Was aware he was a person of interest
 - Was aware plain clothes police officers were following him

Basis for Pitt Opinion #1- Cont.

- Steven Ray Newell:
 - Attempted to coerce others into providing false alibi Re: his whereabouts
 - Attempted to provide investigators with false leads implicating others
 - Initially refused to acknowledge his role – then, after confessing, blamed is upbringing and his failed relationship

Opinion #2

There was **NO** causal connection between any unusual or substantial duress and the sexual assault and murder of the victim.

Basis for Pitt Opinion #2

- Steven Ray Newell:
 - Made myriad goal-directed choices prior, during and subsequent to the offense
 - Made a conscious decision to escort Byrd to an isolated area knowing she was late for school
 - Made a choice to detain Byrd for his own personal gratification

Basis for Pitt Opinion #2 – Cont.

- Steven Ray Newell:
 - Feared he would be caught and elected to kill the only person who could reasonably recount the events
 - After killing Byrd, Newell engaged in a series of elaborate behaviors to conceal his act(s).

Opinion #3

Steven Ray Newell's proffered mental condition (to the extent it exists) was **NOT** causally connected to the sexual assault and murder of the victim.

Basis for Pitt Opinion #3

- Steven Ray Newell:
 - Was capable of making choices
 - Was, at times, able to maintain sobriety, work & a long-standing relationship
 - Demonstrated the capacity to seize the opportunity to take advantage of others in order to meet his needs.

PART III: WORKING WITH MENTAL HEALTH EXPERTS

Mental State at the Time of the Offense

- Mental State at the Time of the Offense
 - Detailed review of months/weeks leading up to offense
 - Detailed review of days/hours leading up to offense
 - Detailed review of actions immediately following offense
- Emphasis on **BEHAVIOR** before
- Emphasis on **BEHAVIOR** after

Mental State at the Time of the Offense – Cont.

- Presence or absence of Mental Disease/Defect
- Presence or absence of relationship between mental disease/defect and criminal behavior
- Relationship between mental disease/defect, criminal behavior, and the relevant legal standard

THE REFERRAL LETTER: WHY IS IT SO IMPORTANT?

[illegible]

The image shows a black and white photograph of a document titled "The Referral Letter" by State V. Newell. The document is a letter from the Attorney General of the State of New Jersey, dated March 1, 1971, to the Honorable John J. Hughes, Governor. The letter discusses the referral of a case to the State Bar of New Jersey for disciplinary action against a lawyer. The document is signed by the Attorney General and includes a list of references at the bottom.

[illegible][illegible][illegible]

The Evaluation Process

- Extensive Record review
 - Medical
 - Criminal/Law Enforcement
 - Correctional
- Psychiatric Interview
- Neuropsychological Assessment
- Travel to the scene

COLLATERAL DATA

Collateral Data

- Police Reports
 - Scene Photos
 - Audio and Video
 - Transcripts
- Prior Criminal History
 - Law Enforcement
 - Probation/Parole
 - Jail/Prison

Collateral Data₂

- Current Detention Records
 - Medical
 - Mental Health
 - Classification
 - Disciplinary
 - Work Assignment
 - Jail Phone Calls
 - Visitation

Collateral Data₃

- Psychiatric Records
 - Inpatient
 - Outpatient
 - Counseling
- Substance Abuse Records
 - Inpatient
 - Outpatient
 - Counseling

Collateral Data₄

- Educational/School Records
- Military Record
- Employment Records
- Financial Records

Collateral Data₅

- Personal Records

- Journals
- Diaries
- Calendar(s)
- Photographs
- Video/Audio Recordings
- E-mail
- Other writings/Correspondence
- Social Media Pages

Newell's Letters

- ✓ 3. I was very very lonely, homeless, hungry, and in deep emotional pain from someone who was had to be helped.

To Every Body!

[illegible][illegible]

Newell's Letters - Cont.

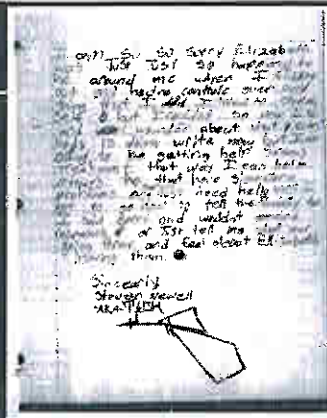
- ☞ I had been with the most wonderful chick I had ever met. I fucked it up of course...
- ☞ I was thrown out out of fear of being alone with it. Despite the fact of how knowing me would cause some of the most humiliating and rape.

and at first he said that I will it

[illegible]

Newell's Letters Cont.

... I am so sorry Elizabeth was hurt. Just as I happened to be standing there when I slipped out and had no control over my hand that I did need to stop my son out control.



Collateral Data

- Evaluation(s) and Report(s) prepared by other Experts
- Psychological Testing
 - Reports and Raw Data
- Other Evaluation Reports
 - MRI/PET/SPECT

COLLATERAL INTERVIEWS

Collateral Interviews

- Who?
 - Family members
 - Friends
 - Co-workers
 - Significant Other(s)
 - Associates
 - Teammates
 - Eyewitnesses
 - Treatment Providers

Collateral Interviews₂

- When?
- Why?
- How?
- How many?

THE BIG PICTURE: TRAVEL TO THE SCENE

The Scene Visit: Why?

- Context
- Complexity
- Perspective
- Nuance

PART IV: QUESTIONS & ANSWERS

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Contents

Papers

- Activated Protein C Resistance Is Uncommon in Sudden Death Due to Pulmonary Embolism—JENNIFER J. RULON,
CHONG G. CHO, LINDA L. GUERRA, ROBERT C. BUX, AND MARGARET L. GULLEY 1111
- Hypertremia and Subdural Hematoma in the Pediatric Age Group: Is There a Causal Relationship?—TRACEY COREY HANDY,
RANDY HANZLICK, LISA B. E. SHIELDS, ROSS REICHARD, AND STEVEN GOUDY 1114
- Drowning Without Aspiration: Is This an Appropriate Diagnosis?—JEROME H. MODELL, MONIQUE BELLEFLEUR, AND
JOSEPH H. DAVIS 1119
- Estimating Time of Death of Deer in Missouri: A Comparison of Three Indicators—BRADLEY M. HADLEY, LYNN W. ROBBINS,
AND DAVID A. BEFFA 1124
- Comparative Studies on Tissue Distributions of Organophosphorus, Carbamate and Organochlorine Pesticides in Decedents
Intoxicated with These Chemicals—FUMIO MORIYA AND YOSHIKI HASHIMOTO 1131
- An Evaluation of the Significance of Transfers of Debris: Criteria for Association and Exclusion—CHESTERENCE CWIKLIK 1136
- Infrared Spectra of U.S. Automobile Original Topcoats (1974-1989): VI. Identification and Analysis of Yellow Organic
Automotive Paint Pigments—Isoindolinone Yellow 3R, Isoindoline Yellow, Anthrapyrimidine Yellow, and
Miscellaneous Yellows—EDWARD M. SUZUKI 1151
- Long PCR for VNTR Analysis—KRISTY L. RICHIE, MINDY D. GOLDSBOROUGH, MARLENE M. DARFLER, ELIZABETH A. BENZINGER,
MELISSA L. LOVEKAMP, DENNIS J. REEDER, AND CATHERINE D. O'CONNELL 1176
- Comparative Identity and Homogeneity Testing of the mtDNA HV1 Region Using Denaturing Gradient Gel
Electrophoresis—ROBERT J. STEIGHNER, LOIS A. TULLY, JUSTIN D. KARJALA, MIKE D. COBLE, AND MITCHELL M. HOLLAND 1186
- The Fitness of Juvenile Court—BRUCE H. GROSS 1199
- Analysis of Ballpoint Pen Inks by Field Desorption Mass Spectrometry—MASATAKA SAKAYANAGI, JUN KOMURO, YAEKO KONDA,
KUNIO WATANABE, AND YOSHIHIRO HARIGAYA 1204

Technical Notes

- A Reevaluation of the Sex Prediction Accuracy of the Minimum Supero-Inferior Femoral Neck Diameter for Modern
Individuals—CHRISTOPHER M. STOJANOWSKI AND RYAN M. SEIDEMANN 1215
- Presenting Three-Dimensional Forensic Facial Simulations on the Internet Using VRML—MARTIN P. EVISON AND
MICHAEL A. GREEN 1219
- Interpolating Between Computerized Three-Dimensional Forensic Facial Simulations—MICHAEL A. GREEN AND
MARTIN P. EVISON 1224
- Validation of the Use of a Commercially Available Kit for the Identification of Prostate Specific Antigen (PSA) in
Semen Stains—JOHN P. SIMICH, SHANNON L. MORRIS, ROBERT L. KLICK, AND KATE RITTENHOUSE-DIAKUN 1229
- Detection of Epithelial Cells in Dried Blood Stains by Reverse Transcriptase-Polymerase Chain Reaction—MARTIN BAUER,
ALEXANDRA KRAUS, AND DIETER PATZELT 1232
- Application of Solid-Phase Microextraction to the Profiling of an Illicit Drug: Manufacturing Impurities in Illicit 4-
Methoxyamphetamine—JOHN C. COUMBAROS, K. PAUL KIRKBRIDE, AND GUNTER KLASS 1237
- TWGDAM Validation of a Nine-Locus and a Four-Locus Fluorescent STR Multiplex System—KATHERINE A. MICKA,
ELIZABETH A. AMIOTT, TARA L. HOCKENBERRY, CYNTHIA J. SPRECHER, ANN M. LINS, DAWN R. RABBACH, JENNIFER A. TAYLOR,
JEFFERY W. BACHER, DEBRA E. GLIDEWELL, SANDRA D. GIBSON, CECILIA A. CROUSE, AND JAMES W. SCHUMM 1243
- Data on the PCR Turkish Population Based Loci: LDLR, GYPA, HBGG, D7S8, and Gc—MELAHAT KURTULUŞ ÜLKÜER,
ÖNER ÜLKÜER, TAHSIN KESICI, AND ADNAN MENEVŞE 1258
- Population Study of HUMTH01, HUMVWA31/A, HUMF13A1, and HUMFES/FPS Systems in Azores—
FRANCISCO CORTE-REAL, LUÍS SOUTO, M. J. ANJOS, MÓNICA CARVALHO, DUARTE N. VIEIRA, ANGEL CARRACEDO, AND M. C. VIDE 1261
- Allele Frequencies of Six STR Loci in Argentine Populations—NOELIA TOURET, JORGE LÓPEZ CAMELO, AND LIDIA VIDAL-RIOJA 1265
- A Systematic Analysis of Secondary DNA Transfer—CARLL LADD, MICHAEL S. ADAMOWICZ, MICHAEL T. BOURKE,
CAROL A. SCHERCZINGER, AND HENRY C. LEE 1270
- Frequencies of D8S384 Alleles and Genotypes in European, African-American, Chinese, and Japanese Populations—
H. Y. MENG, Y. P. HOU, G. D. CHEN, Y. B. LI, J. WU, H. WALTER, AND M. PRINZ 1273
- Population Data on the Thirteen CODIS Core Short Tandem Repeat Loci in African-Americans, U.S. Caucasians, Hispanics,
Bahamians, Jamaicans, and Trinidadians—BRUCE BUDOWLE, TAMYRA R. MORETTI, ANNE L. BAUMSTARK,
DEBRA A. DEFENBAUGH, AND KATHLEEN M. KEYS 1277

Preserving the Integrity of the Interview: The Value of Videotape—STEVEN E. PITT, ERIN M. SPIERS, PARK E. DIETZ, AND JOEL A. DVOSKIN	1287
Alcohol Content of Beer and Malt Beverages: Forensic Considerations—BARRY K. LOGAN, GLENN A. CASE, AND SANDRA DISTEFANO	1292
Case Reports	
Positive Identification of Cremains Recovered from an Automobile Based on Presence of an Internal Fixation Device—JOANNE L. BENNETT AND DEREK C. BENEDIX	1296
Fulminant Liver Failure in a Young Child Following Repeated Acetaminophen Overdosing—MARTIN BAUER, BERNWARD BABEL, HEINRICH GIESEN, AND DIETER PATZELT	1299
Traumatic Rupture of an Abdominal Aortic Aneurysm Associated with the Use of a Seatbelt—YASUO BUNAI, ATSUSHI NAGAI, ISAO NAKAMURA, AND ISAO OHYA	1304
A Case of Suicidal Hanging Staged as Homicide—THOMAS W. ADAIR AND MICHAEL J. DOBERSEN	1307
Detection of Azide in Forensic Samples by Capillary Electrophoresis—GLEN L. HORTIN, SUSANTA K. DEY, MARILYN HALL, AND C. ANDREW ROBINSON JR.	1310
Brief Communication	
Distribution of D1S80 Alleles in the Bahrainian Population—MOHAMMAD A. TAHIR, CAROL ROGERS, MOHAMMED ALKHAYYAT, MONA EL-GOHARY, BRUCE BUDOWLE, AND KUPPAREDDI BALAMURUGAN	1314
For the Record	
Allele Frequencies for Nine STR Loci in African-American, Chinese, Vietnamese, and Bangladesh Populations—S. BORYS, A. EISENBERG, G. CARMODY, AND R. FOURNEY	1316
Allele Frequency Distributions for Nine STR Loci in the Japanese Population—S. BORYS, R. IWAMOTO, J. MIYAKOSHI, G. CARMODY, AND R. FOURNEY	1319
Allele Frequency in the Population of Buenos Aires (Argentina) Using AmpliType® PM+ DQA1—R. A. PADULA, D. A. GANGITANO, G. J. JUVENAL, AND B. BUDOWLE	1320
Correspondence	
Commentary on Tomczak PD, Buikstra JE. Analysis of Blunt Trauma Injuries: Vertical Deceleration Versus Horizontal Deceleration Injuries. <i>J Forensic Sci</i> 1999;44(2):253–262—ALISON GALLOWAY AND RICHARD T. MASON	1321
Authors' Response—PAULA D. TOMCZAK AND JANE E. BUIKSTRA	1321
Commentary on Introna F, Di Vella G, Campobasso CP. Determination of Postmortem Interval from Old Skeletal Remains by Image Analysis of Luminol Test Results. <i>J Forensic Sci</i> 1999;44(3):535–538—GEORGE J. SCHIRO, JR.	1322
Authors' Response—FRANCESCO INTRONA, JR., ET AL.	1322
Commentary on Hochmeister MN, Budowle B, Sparkes R, Rudin O, Gehrig C, Thali M, Schmidt L, Cordier A. Validation Studies of an Immunochromatographic 1-Step Test for the Forensic Identification of Human Blood. <i>J Forensic Sci</i> 1999;44:597–602—BARBARA O. ROWLEY	1323
Authors' Response—MANFRED HOCHMEISTER	1324
Commentary on Koons RD, Buscaglia J. The Forensic Significance of Glass Composition and Refractive Index Measurements. <i>J Forensic Sci</i> 1999;44(3):496–503—JAMES M. CURRAN, JOHN S. BUCKLETON, AND CHRISTOPHER M. TRIGGS	1324
Authors' Response—ROBERT D. KOONS AND JOANN BUSCAGLIA	1326
Commentary on Linch CA, Smith SL, Prahlow JA. Evaluation of the Human Hair Root for DNA Typing Subsequent to Microscopic Comparison. <i>J Forensic Sci</i> 1998;43(2):305–314—MARK J. PETTENATI AND P. NAGESH RAO	1329
Authors' Response—CHARLES A. LINCH AND JOSEPH A. PRAHLOW	1329
Commentary on Willey P and Scott DD, Who's Buried in Custer's Grave? <i>J Forensic Sci</i> 1999;44(3):656–665—NORMAN D. SPERBER	1330
Authors' Response—P. WILLEY AND DOUGLAS D. SCOTT	1330
Partisan Expert Witness Testimony—EMANUEL TANAY	1331
Book Reviews	
Review of <i>The Litigator's Guide to Expert Witnesses</i> —EMANUEL TANAY	1333
Review of <i>Marihuana and Medicine</i> —LEO UZYCH	1334
Review of <i>Principles of Forensic Toxicology</i> —CHARLES L. WINEK	1335
Editorial Communication—ROBERT E. GAENSSLEN	1336
Index to Volume 44	1341
Updated Information for Authors	1377

TECHNICAL NOTE

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Preserving the Integrity of the Interview: The Value of Videotape

REFERENCE: Pitt SE, Spiers EM, Dietz PE, Dvoskin JA. Preserving the integrity of the interview: The value of videotape. *J Forensic Sci* 1999;44(6):1287-1291.

ABSTRACT: This article addresses the value of videotape in forensic mental health evaluations. Literature reviews were conducted using Medline and PsychInfo Databases. The authors briefly describe the general use of videotape, explore the use of videotape within the legal process, respond to opposition to videotape use, discuss confidentiality and consent issues, address possible exceptions to the use of videotape, and express their unwavering support for the use of videotape during forensic evaluations. The authors also provide a detailed set of instructions designed to assist professionals with establishing their own videotaping system. The authors conclude that videotape performs an essential function in the preservation of the integrity of forensic mental health evaluations.

KEYWORDS: forensic science, forensic psychiatry, forensic psychology, videotape, videotaping evaluations

The American Academy of Psychiatry and the Law (AAPL) recently completed a task force report regarding the use of videotape during forensic psychiatric evaluations (1). The task force evaluated the costs and benefits of videotape, discussed clinical and ethical issues germane to using videotape, and initiated the development of a uniform standard of practice for the use of videotape.

The AAPL task force concluded that, given the current state of research, a blanket endorsement of the use of videotape during forensic psychiatric evaluations is premature. The panel did, however, recognize that videotaping forensic psychiatric evaluations is a medically ethical practice. Moreover, several of the benefits of videotape are cited within their report.

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In this article, we briefly describe the general use of videotape, explore the use of videotape within the legal process, respond to opposition to videotape use, discuss confidentiality and consent issues, address possible exceptions to the use of videotape, and express our unwavering support for the use of videotape during forensic evaluations. We also provide a detailed set of instructions designed to assist professionals with establishing their own videotaping system.

Universal Applications

The use of audio and videotape to optimize education is a well established practice. Recorded materials have utility in disseminating information and have long been used in the behavioral sciences for research, documentation, professional training and public education (2). Behavioral scientists have made use of this medium for evaluating their own performance and highlighting areas in need of improvement in their interview styles and techniques. Furthermore, some therapists have used videotape as a means of enhancing patients' self-awareness and introspection (2).

Widespread use of videotape has proved invaluable in such diverse areas as scientific research, enhancing reports and presentations, and providing feedback during performance training. Despite the breadth of its availability, utility, and acceptance, the authors contend that videotape is underutilized by forensic mental health evaluators.

Videotape and the Legal Process

The courts have become increasingly amenable to the use of videotaped testimony during legal proceedings. Such testimony is widely used in the context of custody and child abuse cases. The use of videotape with children served initially to protect children from unnecessary, repeated interviews. According to the American Academy of Child and Adolescent Psychiatry, the benefits of videotape include the verbatim preservation of children's initial statements, the reduction of instances in which children are forced to testify repeatedly, the presentation of videotape testimony to a grand jury, and the educational use of videotape to improve interviewer skills (3).

While the use of videotape began in the legal profession with the investigation and prosecution of child sexual abuse, its application has been far reaching. Videotape has been successfully employed in a myriad of settings in which accurate preservation of evidence

is valued by the legal system. The ability to capture and retain an accurate audio-visual record is an invaluable tool in law enforcement interviews, depositions, grand jury testimony, crime scene analysis, autopsies, and forensic mental health interviews.

Legal issues surrounding the use of videotape in forensic psychiatric settings have been examined by both state and federal court systems (1). Thus far, it has been concluded that an interviewer is neither required to use nor prohibited from using videotape during his or her interview (1). Furthermore, the interviewer is not required to provide a formal Miranda warning to the interviewee (1). The interviewer should, however, at the onset of the interview, provide a comprehensive description of the limits of confidentiality and attempt to obtain the subject's consent or assent, depending upon the context of the particular interview.

As courts become more accustomed to the use of videotaped interviews, it will be necessary for mental health professionals to enhance their standard of practice to keep pace with the expectations of lawyers, judges, and jurors.

Confidentiality and Consent

The use of videotape for forensic mental health interviews is accompanied by specific professional issues and concerns. In preparing this paper, the authors requested information from the American Psychiatric Association, American Academy of Psychiatry and the Law, American Psychological Association, American College of Forensic Psychiatry, American Board of Forensic Psychology, the Psychiatry and Behavioral Science Section of the American Academy of Forensic Sciences, and the American College of Forensic Examiners.

With the exception of the AAPL task force report, none of the aforementioned associations has issued a policy statement or guideline about the use of videotape. However, the American Psychological Association referred the authors to the Division 41 specialty guidelines of the American Psychology-Law Society. The American Psychiatric Association, American College of Forensic Psychiatry, and American College of Forensic Psychology, each referred the authors to ethical guidelines regarding confidentiality and informed consent.

According to the AAPL ethical guidelines, "the psychiatrist maintains confidentiality to the extent possible given the legal context . . . An evaluation for forensic purposes begins with notice to the evaluatee of any limitations on confidentiality." (4) Prior to the onset of any videotaped interview, it is incumbent upon the examiner to provide the interviewee with a detailed description of both the limits of confidentiality and the purpose of the evaluation. It is also wise to have the interviewee sign an informed consent document that eliminates his or her uncertainty about the limits of confidentiality, and to repeat the limits of confidentiality and purpose of the interview after taping has begun. Furthermore, the subject must be informed (preferably on tape) of all recording devices and the nature and potential use of the work product following the interview. It is also necessary to obtain consent (or assent) for the interview from either the individual or the agency acting on the subject's behalf. With respect to consent, AAPL ethical guidelines state, "Where consent is not required, notice is given to the evaluatee of the nature of the evaluation. If the evaluatee is not competent to give consent, substituted consent is obtained in accordance with the laws of the jurisdiction (4)."

Furthermore, prior to the onset of any forensic psychiatric evaluation, it is important to remind the subject that while the evaluator is a mental health professional, his or her current function is not

in the role treating clinician. One should be mindful of a subject's limited understanding of this distinction (4).

Response to Opposition

Five principal objections have been raised to the use of videotape in forensic mental health evaluations. We address each of these in turn.

Third Party Presence—Attorneys will frequently argue that their presence, or that of a representative acting on their behalf, is necessary during a forensic evaluation. This contention is often held to be based on the desire to ensure their client's constitutional rights and to verify the accuracy of future accounts of the interview (5). Additionally, attorneys may express concern about the accuracy of a psychiatrist's recollection and interpretation of nonverbal behaviors observable during a psychiatric evaluation. An attorney may also wish to observe the process in order to guarantee that the level of professionalism on behalf of the psychiatrist is not compromised at any time during the interview. The courts have not uniformly upheld a right of a defendant to have counsel present during a forensic psychiatric evaluation. In fact, in *Estelle v. Smith*, the U.S. Supreme Court found that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination (6)." In some cases, however, it has been held that the defendant may request videotape (1).

Videotape allows for the preservation of a precise account of an evaluation. The use of a videotape system with cameras positioned to face both the examiner and subject negates possible allegations of impropriety. Using a dual camera design, all behavior, interviewer and interviewee alike, may be accounted for without compromising the interview. Videotape addresses the need for verified accuracy without the disruptive effect of the presence of an attorney.

An additional advantage of videotape speaks directly to complications which may arise from an attorney's presence during an examination. The attorney who attends a forensic evaluation may potentially be compelled to testify regarding the interview he or she observed. Videotaping provides counsel with an explicit account of the interview while negating the perceived need for his or her attendance. To this end, the use of videotape precludes the possibility that an attorney may be forced to withdraw as counsel under the attorney-witness rule.

In addition, it prevents the attorney from influencing the interview in an undiscoverable manner. For example, one of the authors participated in a case that involved a defendant charged with kidnapping and sexual assault. The defendant alleged that the offenses were committed by an "alter" personality. A videotaped interview, conducted by a defense-retained psychologist and psychiatrist, was attended by defense counsel. As the interview progressed, the "alter" personality was interviewed by the aforementioned experts and defense counsel. During a review of the same videotape, prosecution-retained experts determined that the defendant was malingering.

Interviewer-Interviewee Relationship—A common argument used to dispute the use of videotape in a clinical psychiatric setting is that such devices may interfere with the establishment of therapeutic rapport (5). This concern surrounds the patient's lack of trust, which is thought to result in a lack of openness during the interview.

In the case of the forensic interview, however, the professional is striving to evaluate and assess rather than to treat. The subjects,

therefore, remain litigants rather than patients (7). Indeed, as Dietz points out, "The most fundamental distinction between clinical and forensic psychiatry is the absence of a doctor-patient relationship in the latter (8)." The purpose of the interview is primarily investigative, i.e., examining and presenting evidence regarding the litigant's behavior. It is therefore incumbent upon the professional to develop an interview style most conducive to accurate reporting by the subject without exploiting therapeutic rapport.

Videotape Tampering—Opposition to the use of videotape on the basis of susceptibility to tampering is simply without merit. Videotape tampering, such as pauses or breaks, can be readily identified by laypersons lacking any special technical training. However, should a concern be raised with regard to the integrity of a particular tape, experts are available to assess the material for flaws (7). It is possible, though unnecessary, to further protect against tampering by simultaneously producing duplicate copies with a time code, which creates a daunting obstacle to any party who may attempt to alter a videotaped interview.

Professional Liability—Resistance to the uniform use of videotape also arises from the concern of some evaluators regarding their own professional liability. Although there may be evaluators who have something to hide, we regard this as another argument in favor of videotape. The likelihood that one's work will be examined within a legal context is inherent in forensic psychiatry. The forensic professional must never be fearful of having his or her own work product preserved and scrutinized. Those who seek to avoid having their work product openly reviewed raise questions regarding the manner in which their work is conducted.

For example, one of the authors was retained as a prosecution witness in a case involving a serial rapist who alleged that, during the commission of the offenses, he suffered from a Dissociative Identity Disorder. A defense-retained psychologist met with the defendant on multiple occasions; however, only a select number of interviews were videotaped. The defense expert's videotaped interviews were noteworthy for leading questions, the repeated use of profane language and the absence of a time code, all of which called into question the professionalism of the interviewer.

Professionals who are mindful and conscientious will be able to embrace the advantages of videotape without reservations about liability. In fact, videotape may serve a protective function in the face of inquiry regarding an interviewer's conduct during an evaluation. An example of the protective nature of videotape is demonstrated by a toxic tort case in which one of the authors was retained as a defense expert. In addition to claiming emotional damages, the plaintiff alleged that her injuries led to a restriction in the range of motion of her upper extremities. On direct examination, the plaintiff alleged that during the independent psychiatric evaluation (which was attended by an associate of plaintiff's counsel), the examiner berated her and engaged in hostile dialogue. During the author's direct testimony, the veracity of the plaintiff's allegations was refuted through videotaped documentation of the interview which was viewed in its entirety by the jury. The production of a videotaped record allowed the jurors to see that the plaintiff had unlimited use of her upper extremities and prevaricated about what had taken place during the examination.

Heightened Workload—The potential for extensive and time-consuming review has been cited as an additional concern surrounding the use of videotape in forensic psychiatry (1). The opposing expert, through discovery, may have the opportunity to

examine the videotaped psychiatric interview. Subsequently, he or she may elect to videotape his or her own interview, necessitating the labor-intensive review of tapes from each side. Such comprehensive review in turn creates a scenario in which the expert may be subject to a more rigorous cross-examination (1).

The use of videotape may indeed facilitate the need for additional time allotted to review taped interviews. It additionally may heighten the intensity of potential cross-examination one may encounter. These arguments, however, are lacking in both weight and integrity. The nature of the field is such that meticulous preparation for report writing, testimony, and cross-examination are the cornerstones of our profession. The use of a tool that allows for superior preparation of an expert witness must never be discarded out of concern for a heightened workload.

In his text, *The Psychiatrist as Expert Witness*, Guthiel strongly recommends opposing both the presence of counsel and/or videotape during the interview, citing (with respect to videotape) the potential for distraction of the interviewer and opportunistic responses by the interviewee (9). Guthiel holds that "under rare circumstances, an audiotape or videotape of an interview may be constructive; it is certainly beneficial for teaching and for self-review for quality assurance. Verbatim material also can be obtained this way. However, unobtrusive note taking probably represents the optimum compromise among choices."

It is our position that videotape is the optimum choice for the forensic interview. The ability to capture a subject's unique image and verbalizations on videotape unequivocally enhances the caliber of the evaluation and report. In our experience, the use of videotape does not serve as a distraction, nor does it result in response bias. We do not dispute the benefits of note-taking, however, videotape allows for intricacies unavailable to audiotape or note taking alone, such as subsequent examinations of nonverbal behavior, appropriateness of affect, and changes in affect during successive interviews. It also eliminates the possibility of intentional or unintentional bias in the selection of what is documented by the note-taker. To this end, videotape is an unparalleled instrument for preserving the integrity of a forensic psychiatric interview.

The importance of preserving subtle aspects of an interview is demonstrated in a case in which one of the authors was retained to examine a defendant charged with the double murder of an elderly couple. Both victims' throats had been cut with a bowie knife. At the onset of the independent psychiatric examination, the defendant was vague and evasive, providing monosyllabic responses to the interviewer's questions. However, the defendant, a knife enthusiast, demonstrated a marked change in his demeanor after being provided with an illustrated catalog of knives. He spoke at length with the examiner about his knowledge of the various knives depicted in the text. He described his familiarity with the different knives and knife-related products. In addition to significantly increasing his verbal dialogue, the defendant's affect became more animated and his rapport with the examiner improved. Videotape provided a comprehensive documentation of the totality of the defendant's demeanor.

The Establishment and Use of a Videotape System

When incorporating videotape into a forensic psychiatric practice, the professional should be mindful of the audience(s) who may ultimately view their work product. In addition to preserving the integrity of the interview, he or she is creating a legal document that may be introduced into a court of law. Consequently, the interviewer should make a concerted effort to use equipment that ensures an accurate record of the proceedings.

The AAPL task force cites standards that attorneys are obligated to demonstrate prior to submitting a videotape into legal proceedings (1). These standards address several factors that focus on the production and utility of videotape. It is essential that forensic professionals be aware of and comply with such standards. This includes making certain that the videotape functions properly, the tape is authentic, the tape has not been altered, the film has been properly maintained, the tape is clear and is in no way unintelligible or misleading, and that any confessions contained within the tape were not coerced.

The integration of videotape into professional practice need not be an intimidating or arduous process. When developing a videotaping system, Dowrick contends that equipment should be selected to simply meet one's individual needs rather than succumbing to the temptation of an elaborate, overly complicated system (2). The authors agree that complexity should not be mistaken for usefulness when purchasing video products. The use of industrial videotape equipment is recommended as this equipment is durable and reasonably priced. Certain features must be included in order to create an appropriate record of any interview.

The ideal office-based videotaping system uses two cameras in the interview area. One camera should be either mounted or on a tripod behind the interviewee, and thus focused on the interviewer, while a second camera should be either mounted or on a tripod behind the interviewer and focused on the subject. The pictures are then fed into the same monitor in order to produce a picture-in-picture format or a split-screen format. This dual-camera design thwarts challenges about the non-verbal interactions between the interviewer and the interviewee.

The video monitor ensures accurate positioning of camera equipment and makes certain that both parties are appropriately captured on the videotape. In addition, the monitor allows the professional to review the end product. Notwithstanding the utility of a monitor, having the monitor operating during an evaluation serves as a distraction to the interview process. It is, therefore, recommended that if the monitor is located in the interview room, it remains off during the course of the interview. With the agreement of the interviewee's attorney, the monitor may be attended by a technician responsible for the videotaping.

Appropriate lighting is another factor that must be considered during the videotaping process. It is important that shadows and other obstacles be avoided. Positioning subjects according to light sources and windows is important for the reproduction of clear, precise images on tape. Lights must be set in a manner most conducive to the creation of an accurate picture. It is helpful if the camera is equipped with a manual iris to allow the user to determine the overall exposure (2).

Another important consideration is inclusion of a date and time code. We have found it extremely beneficial to have a running time code that captures the date the interview is conducted as well as a real time clock. The date and time code provides an added measure of accuracy and professionalism and can be exceedingly useful after a transcript of the interview is produced. Furthermore, this precaution protects against tampering with the videotape.

Gardner advises the use of equipment that allows for the simultaneous production of three master tapes as opposed to making one master followed by subsequent dubbings (7). The authors agree with this procedure. Often, one will be required to provide copies of the interview to multiple parties associated with a particular case. With analog equipment, subsequent dubs deteriorate with each generation and may result in one or more of the participants receiving an uneven work product. Moreover, the concurrent pro-

duction and distribution of three tapes helps to deter any party from tampering with the individual copy that he or she has received.

Appropriate sound amplification is critical and must allow for an accurate audiotaped recording. Frequently, built-in audio recording equipment used with hand held recreational video machines is vulnerable to audio feedback and a disproportionate volume of ambient sounds in close proximity to the camera. To this end, it is worthwhile to invest in a high quality omnidirectional microphone, or to equip each participant with their own microphone, so as to ensure that the sound is of excellent quality.

In addition to a comprehensive videotaping system, a backup audiotape recording should be made to preserve a separate and distinct audio account of the interview. The audiotape not only maintains the audio record, but is essential if one plans to have a transcript made of the interview. It is highly ineffective and time-consuming for a transcriptionist to use the videotape as his or her primary source for preparing a transcript. Rather, it is far more productive to use an audiotape as the mechanism by which all transcripts are made.

Thoughtful selection of the type of audiotapes and videotapes used will add to the quality of the recording. We have found that videotapes should run no longer than 120 min, and the audiotapes should allow for 60 min of recording per side, for a total of 120 min per tape. The use of 120 min audiotapes and videotapes allows the interviewer to routinely change both audiotape and videotape at 2 h intervals. This is most effectively achieved when your audiotape player has an auto-reverse function that allows for audiotape recording on both sides of the tape without having to manually turn over the tape. We discourage the use of extended play videotapes, as the quality of these tapes is frequently inferior to standard VHS products, and the lack of coordination between audio and video recording may result in unnecessary confusion or distraction.

Storage of video and audiotapes is no more cumbersome than storing written records. Videotapes are roughly one inch in width and seven inches in length, therefore, two tapes placed adjacent to one another require no more space than an inch thick stack of standard paper. Audiotapes, which are substantially smaller, take up even less space.

In addition to establishing a comprehensive office-based video system, the professional may need portable equipment. When interviewing individuals housed in correctional settings or psychiatric facilities, the evaluator may be required to perform the evaluation on-site. Portable equipment will usually be less elaborate than a stationary system. However, one must make every effort to ensure that the work product remains of superior quality. The portable system must include a video camera and a tripod. Again, it is essential that the video camera be equipped with a date and time code. As previously discussed, all videotape should be supplemented with an audio backup to facilitate transcription. When conducting an on-site evaluation, the interviewer should position the camera so as to capture the images of both parties on screen. This is usually best achieved by placing the camera to the side, thus providing a profile view of both interviewer and interviewee. It is of particular importance that one use only the highest quality videotape in conducting evaluations of this nature. As simultaneous production of duplicates is likely not possible, quality videotape will minimize distortion on subsequent dubbings.

Exceptions to the Use of Videotape

Institutional policies and financial constraints may make videotaping each and every forensic evaluation impractical. In these

cases, every effort should be made to audiotape the evaluation, thereby preserving the integrity of the spoken word. Furthermore, there are rare occasions whereby a stationary videotaping system may be unable to capture an evaluatee who cannot sit still.

The authors also recognize that the development and implementation of a comprehensive videotaping system may present a financial hardship for part-time practitioners or for professionals in the early stages of their practice. One way to overcome this obstacle is for forensic mental health professionals to share the cost of equipment. As videotaping equipment becomes increasingly affordable, we believe that more and more forensic evaluations will be, and should be, videotaped.

Even professionals who videotape their forensic evaluations will come across certain situations when the cost of videotaping may not be justified by the nature of the evaluation (e.g., pre-sentence reports, social security disability evaluations). In such cases, forensic mental health professionals must assess the effect that forgoing a videotaped evaluation will have on their work product.

Conclusion

The use of videotape during forensic mental health evaluations is advantageous for all parties who have an interest in seeking the truth. Videotape permits the preservation of data in order for all subsequent evaluators to have access to equivalent material. Furthermore, it allows for the identification of any instances in which interviewers asked leading questions, implanted ideas or symptoms, or otherwise shaped the evidence. Videotape further provides a verbatim record so evaluators needn't rely on memory or note-taking ability to faithfully capture the exact language that is so often the most important finding in a forensic psychiatric interview. The use of videotape encourages evaluators to conduct interviews of a quality that can withstand scrutiny, while concurrently protecting evaluators against unfounded claims of impropriety, all without introducing a third person into the interview room. Videotaped evaluations additionally protect the attorney, who may have otherwise wished to attend an evaluation, from being called as a witness.

The AAPL Task Force concluded that, given the current state of research available, it was unable to provide a blanket recommendation regarding the use of videotape in forensic psychiatry (1).

The Task Force did, however, determine that videotaping of interviews is an ethically acceptable medical practice. Furthermore, it is recognized that other legal and professional sources (e.g., statutes, case law, and practice guidelines) may require or recommend videotaping in certain circumstances. It was recommended that all forensic training programs consider the educational use of videotaping forensic interviews.

According to Dietz, "Some of the consumers of forensic psychiatric services are poorly equipped or unmotivated to distinguish among mediocrity, proficiency, and excellence" (10). The authors believe that through the use of videotape in forensic interviews, one is able to bridge the gap between proficiency and excellence in his or her own practice. Videotape performs an essential function in preserving the integrity of forensic interviews. No other medium allows for the complete and accurate recording of data that a videotape provides.

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